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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

**In re WILLIAM S. SIMON,
on Habeas Corpus.**

A127737

**(San Mateo County
Super. Ct. No. SC068159)**

THE COURT:*

Petitioner William S. Simon was convicted upon his nolo contendere plea to felony driving under the influence. (Veh. Code, § 23152, subd. (b).) The superior court sentenced petitioner to a term of two years in state prison, with a total of 383 days of actual and local conduct credits (259 actual days plus 124 conduct credits). (Pen. Code, § 4019.¹)

Petitioner's appeal from his conviction in case number A127016 is presently pending in this court. At petitioner's request, we have taken judicial notice of the entire record and the briefs contained in this court's file in case No. A127016. (Evid. Code, §§ 452, subd. (d), 459, subd. (a).)

On March 2, 2010, petitioner's appellate counsel filed the petition for writ of habeas corpus herein, raising challenges to the superior court's presentence custody credit

* Before Jones, P.J., Simons, J. and Needham, J.

¹ Unless otherwise indicated, all further section references will be to the Penal Code.

calculation.² Petitioner alleges that a proper calculation of credits would have resulted in his release on parole as early as February 7, 2010, and no later than May 26, 2010. The petition further alleges that petitioner's appellate remedy in case No. A127016 is inadequate, since his prison term will be served before a decision can be reached in the appeal. (See *In re Newbern* (1960) 53 Cal.2d 786, 789-790.)

In recognition of the urgency of the petition, we promptly requested briefing from the Attorney General and permitted petitioner to file a reply. We subsequently permitted petitioner the opportunity to file a verified supplemental petition, and allowed for the filing of opposition and reply briefs thereto. The parties submitted filings waiving issuance of an order to show cause and oral argument.³ Thus, we will proceed to examine the petition's merits.

Petitioner argues that that he should have received 260, rather than 259, days of actual presentence credit under section 2900.5, subdivision (a). Petitioner points to the probation report, which indicates that petitioner was arrested and released on January 11, 2009, and argues that he is entitled to credit for that partial day spent in custody, pursuant to *People v. Smith* (1989) 211 Cal.App.3d 523, 526. However, as the Attorney General correctly observes, the record before us does not definitively reveal whether petitioner was booked on January 11, 2009, and whether a defendant is in custody for purposes of credit calculations depends on whether petitioner was booked. (*People v. Ravaux* (2006) 142 Cal.App.4th 914, 919-921.) Petitioner's reply does not persuade us otherwise.

The bulk of the petition is devoted to petitioner's argument that under the recent amendments to section 4019, petitioner is entitled to additional presentence work and conduct custody credits. The petition argues that the amendments to section 4019 should

² Before seeking habeas relief in this court, petitioner's counsel submitted a letter to the superior court entitled "Application for Correction of Prejudgment Credits (Pen. Code, § 1237.1; *People v. Fares* (1993) 16 Cal.App.4th 954," which urged the superior court to recalculate petitioner's credits. Nothing in the record before us indicates that the superior court acted on petitioner's request.

³ Additionally, while petitioner was amenable to the immediate issuance of the remittitur, the Attorney General was not.

be retroactively applied to petitioner's sentence, which was imposed prior to the effective date of the amendments (Jan. 25, 2010). Petitioner further asserts that his due process and equal protection rights would be violated if the amended statute is not applied to him.

A split has emerged among the appellate courts about whether the amendments to section 4019 are retroactive. One court (the Fifth District) has held that the amended statute only applies prospectively. (*People v. Rodriguez* (2010) 182 Cal.App.4th 535 (*Rodriguez*).) To date, several other courts (the Third District, Division One of the Second District, and Division Two of the First District) have held that the amended statute applies retroactively. (*People v. Brown* (Mar. 16, 2010, C056510) ___ Cal.App.4th ___, 2010 WL 924421; *People v. House* (Apr. 9, 2010, B212057) ___ Cal.App.4th ___, 2010 WL 1408922; *People v. Landon* (Apr. 13, 2010, A123779) ___ Cal.App.4th ___, 2010 WL 1444011.) We agree with those courts which have held that the amendments apply retroactively, and respectfully disagree with the contrary conclusion reached in *Rodriguez*. Petitioner's supplemental petition, which has not been rebutted or opposed by the Attorney General, demonstrates that petitioner is not excluded from the amendments by virtue of the provisions of subdivisions (b)(2) and (c)(2) of section 4019. Consequently, we hold that petitioner is entitled to a recalculation of his presentence custody credits.⁴

Therefore, the petition for writ of habeas corpus is granted in part and denied in part. A writ of habeas corpus shall issue commanding the superior court to forthwith recalculate petitioner's credits under amended section 4019, after providing notice to the parties and considering any pertinent evidence submitted by the parties. Thereafter, the superior court shall revise the sentencing order and abstract of judgment accordingly, and immediately forward a certified copy of the amended abstract to the Department of Corrections and Rehabilitation.

⁴ In light of this conclusion, we need not address petitioner's due process or equal protection claims. Additionally, petitioner's contention that he is entitled to four more days of conduct credit under former section 4019 appears moot in light of our conclusion that the amendments to section 4019 are retroactive.

This decision shall be final as to this court within three court days. (Cal. Rules of Court, rule 8.387(b)(3)(A).)⁵

⁵ The clerk shall file a copy of this opinion in the related appeal in case No. A127016.